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George C. Cochran

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prove the ruling in the principal case, its holding would permanently lay to rest the commissioner's contention, suggested by *Schubert*, that one cannot obtain more rights than one's devisor or vendor had. As pointed out in *World Publishing* the problem should be analyzed on the basis of what the taxpayer has rather than what a prior lessor may have had. From this point of view *World Publishing* and *Moore* are in accord.

BORDEN R. HALLOWES

Insane Persons—Involuntary Commitment Procedures—Due Process

North Carolina's statutory commitment procedure has been put together in a piecemeal manner¹ and does not readily conform to any pattern of laws applicable in other jurisdictions.² The General Assembly, recognizing the special problems concerning care of the mentally ill, has constantly striven to modernize the old law.³ In what has appeared to be cognizance of this endeavor, the court has taken judicial notice of the fact that commitment of a mentally ill person involves a procedure unlike any other.⁴

For example, in the case of *In re Harris*,⁵ the court overruled previous decisions⁶ and enlarged the writ of habeas corpus to the

¹ See N.C. GEN. STAT. §§ 122-35.1 to -68.1 (1958), as amended, N.C. GEN. STAT. §§ 122-36 to -68.1 (Supp. 1961).

² For graphic comparisons of all state procedures see LINDMAN & MCINTYRE, *THE MENTALLY DISABLED AND THE LAW* 44-106 (1961); Ross, *Commitment of the Mentally Ill; Problems of Law and Policy*, 57 MICH. L. REV. 945, 1008-16 (1959). Nonconformity by North Carolina is not in itself damning, for there is little conformity between the states as to any type of commitment procedure. See LINDMAN & MCINTYRE, *supra*; Ross, *supra*. An attempt to gain uniformity was made in 1950 by the preparation of a "Draft Act" which was sent to all the state governors as a working model to be adapted to local needs and conditions. NATIONAL INSTITUTE OF MENTAL HEALTH, FEDERAL SECURITY AGENCY, *A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL* (Public Health Service Pub. No. 51, 1951). Approximately ten states have adopted the Draft Act in whole or in part. Slovenko & Super, *Commitment Procedures in Louisiana*, 35 TUL. L. REV. 705 n.2 (1961).

³ There have been over forty changes since 1958 dealing with mental health. See N.C. GEN. STAT. ch. 122 (Supp. 1961). Twenty-two of these deal directly with commitment procedures. See N.C. GEN. STAT. §§ 122-36 to -91 (Supp. 1961).

⁴ Involuntary commitment proceedings are, strictly speaking, neither a civil action nor a special proceeding. *In re Cook*, 218 N.C. 384, 11 S.E.2d 142 (1940). This "creates a problem only in the minds of those who are not familiar with the distinction between a hospitalization proceeding and a criminal or civil trial." Whitmore, *Comments on a Draft Act for the Hospitalization of the Mentally Ill*, 19 GEO. WASH. L. REV. 512, 524-25 (1951).

⁵ 241 N.C. 179, 84 S.E.2d 808 (1954).

⁶ *E.g.*, *In re Chase*, 193 N.C. 450, 137 S.E. 305 (1927).

extent that it now provides for a judicial determination as to the person's sanity at the time that the writ is issued,⁷ while also serving its historical purpose of testing the legality of the original detention. This means simply that no commitment is "final."⁸ Now the writ can be used in the form of an appeal,⁹ thus acting as a further safeguard to prevent the continuing incarceration of a person of sane mind.

In the recent case of *In re Wilson*,¹⁰ the petitioner was indeterminately committed to a mental hospital through the use of North Carolina's "standard" procedure:¹¹

(1) Filing of an affidavit before the clerk of the superior court requesting an examination of an alleged mentally ill¹² person;¹³

(2) Issuance of an order by the clerk directing two physicians to personally examine the proposed patient.¹⁴

(3) Certification by the physicians, service of notice to the proposed patient, and the conducting of a hearing by the clerk;¹⁵

(4) Upon determination by the clerk that the person is in need of care and treatment, commitment to a mental hospital for an observation period;¹⁶

⁷ N.C. GEN. STAT. § 17-33(2) (1958) provides for release "Where, though the original imprisonment was lawful, yet by some act, omission, or event which has taken place afterwards, the party has become entitled to be discharged." The court stated that the "recovery from a mental disease after commitment to an institution would seem to be an 'event which has taken place afterwards' . . ." within the meaning of the statute and held that the petitioner was entitled to be released. 241 N.C. at 181, 84 S.E.2d at 809.

⁸ This is used in the context that a person committed has no means of release except by will of the hospital authorities or some other nonjudicial authority.

⁹ *Hiatt v. Soucek*, 240 Iowa 300, 36 N.W.2d 432 (1949).

¹⁰ 257 N.C. 593, 126 S.E.2d 489 (1962).

¹¹ This procedure is not to be confused with admittance by medical certification as provided in N.C. GEN. STAT. § 122-62.1 (Supp. 1961) or emergency commitment as provided in N.C. GEN. STAT. § 122-57 (Supp. 1961).

¹² "[A]n illness which so lessens the capacity of the person to use his customary self control, judgement, and discretion in the conduct of his affairs, and social relations as to make it necessary and advisable for him to be under treatment, care, supervision, guidance, or control." N.C. GEN. STAT. § 122-35.1 (1958).

¹³ N.C. GEN. STAT. § 122-42 (1958).

¹⁴ N.C. GEN. STAT. § 122-43 (Supp. 1961). The physicians cannot be related by blood or marriage to the proposed patient or directly connected with the hospital of commitment. *Ibid.*

¹⁵ N.C. GEN. STAT. § 122-46 (Supp. 1961).

¹⁶ *Ibid.* The period is originally for sixty days. This may be extended another four months upon request of the hospital authorities and by order of the clerk. N.C. GEN. STAT. § 122-46.1 (Supp. 1961). This procedure was followed in the principal case. 257 N.C. at 594, 126 S.E.2d at 489.

(5) At the end of the observation period, filing of a report by the hospital authorities stating their conclusions;¹⁷

(6) Indeterminate commitment ordered by the clerk if the "facts may warrant."¹⁸

After more than two years of treatment a writ of habeas corpus was filed. The writ challenged the legality of the petitioner's confinement on the grounds that indeterminate commitment, following the observation period, without benefit of a prior notice and right to a second hearing, violated her rights under article I, section 17 of the constitution of North Carolina, and under the due process clause of the 14th amendment to the Constitution of the United States.¹⁹ The court agreed with this line of reasoning and held that the petitioner was being deprived of her liberty without benefit of due process of law.²⁰ As interpreted it would appear that this adherence to strict due process requirements has placed a considerable barrier in the path of future advances in realistic mental health legislation.

There is a split of authority with regard to due process requirements²¹ and the mentally ill person's right to notice and hearing. The majority²² holds that commitment without judicial authority,²³ and thus without notice and hearing, does not violate procedural due process, if there is an immediate right of appeal,²⁴ or provisions

¹⁷ N.C. GEN. STAT. § 122-46.1 (Supp. 1961).

¹⁸ *Ibid.*

¹⁹ 257 N.C. at 595, 126 S.E.2d at 490-91.

²⁰ *Id.* at 597, 126 S.E.2d at 492. The court interpreted the power granted the clerk to indeterminately commit "as the facts may warrant" under N.C. GEN. STAT. § 122-46.1 (Supp. 1961) to mean that the patient must first be given notice and a right to a hearing. Thus the court upheld the constitutionality of the statute but condemned the interpretation.

²¹ For a complete and intricate analysis of this subject see Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criterion*, 66 YALE L.J. 319 (1957).

²² Kadish, *A Case Study in the Significance of Procedural Due Process—Institutionalizing the Mentally Ill*, 9 WESTERN POLITICAL Q. 93, 111 (1956); *Hearings Before the Subcommittee on Constitutional Rights on the Senate Committee on the Judiciary*, 87th Cong., 1st Sess. 92-3 (1961) [hereinafter cited as 1961 *Hearings*].

²³ A procedure is not judicial unless the court has discretion to determine whether or not an individual should be committed. "The mere fact that a judge must sign a hospitalization order or make a perfunctory examination of the hospitalization papers has not been sufficient to classify the procedure as judicial." LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 23.

²⁴ *Payne v. Arkebauer*, 190 Ark. 614, 80 S.W.2d 76 (1935); *Ex parte Scudamore*, 55 Fla. 211, 46 So. 279 (1908); *In re Bryant*, 214 La. 574, 38 So. 2d 245 (1948); *Dowdell*, Petitioner, 169 Mass. 387, 47 N.E. 1033 (1897); *accord, In re Coates*, 9 N.Y.2d 242, 213 N.Y.S.2d 74, 173 N.E.2d 797 (1961).

for filing a writ of habeas corpus that will test the question of sanity.²⁵ The minority requires notice and right to a hearing.²⁶ Most of the minority decisions are distinguishable on the grounds that adequate review procedures were not available.²⁷ It should be noted that in *all* the cited cases the question before the court was whether or not notice and the right to a hearing is required prior to indeterminate commitment *without* benefit of a prior observation period or prior hearing, both of which were present in *Wilson*.

There has been no prior case law in this jurisdiction concerning this particular point except *In re Boyette*.²⁸ There the court held unconstitutional a statute permitting a judge to commit a person to a mental hospital after acquittal from a homicide case on the grounds of insanity. The statute in question provided no means of release except by act of the General Assembly. The decision was based on the propositions that the statute provided for no hearing before commitment, and that after commitment there were no provisions for judicial review.

Much of the *Boyette* decision was based upon the latter proposition.²⁹ It is important to note that at the time of this decision the writ of habeas corpus had not been enlarged³⁰ and that a person so

²⁵ *Hammon v. Hill*, 228 Fed. 999 (W.D. Pa. 1915); *Paul v. Longino*, 197 Ga. 110, 28 S.E.2d 286 (1943); *Hiatt v. Soucek*, 240 Iowa 300, 36 N.W.2d 432 (1949); *People v. Terrance*, 11 N.Y.2d 362, 229 N.Y.S.2d 737, 183 N.E.2d 752 (1962); *Ex parte Dagley*, 35 Okla. 180, 128 Pac. 699 (1912); *In re Crosswell*, 28 R.I. 137, 66 Atl. 55 (1907); *McMahon v. Mead*, 30 S.D. 515, 139 N.W. 122 (1912).

²⁶ *In re Lambert*, 134 Cal. 626, 66 Pac. 851 (1901); *In re Wellman*, 3 Kan. App. 100, 45 Pac. 726 (1896); *State ex rel. Blaisdell v. Billings*, 55 Minn. 467, 57 N.W. 794 (1893); *State ex rel. Fuller v. Mullinax*, 364 Mo. 858, 269 S.W.2d 72 (1954). *Barry v. Hill*, 98 F.2d 222 (D.D.C. 1938) has been frequently cited supporting the minority rule but is distinguishable on the grounds that a commitment statute was not involved.

²⁷ *Ross*, *supra* note 2, at 977. The only case that is not clearly distinguishable is *State ex rel. Fuller v. Mullinax*, *supra* note 26. An anomaly of the minority rule is that in some instances the mentally ill person is not required to be actually present at the hearing. *In re Wellman*, *supra* note 26. In line with this reasoning are cases upholding the validity of substitute notice. See, e.g., *Okerberg v. People*, 119 Colo. 529, 205 P.2d 224 (1949) (notice to guardian *ad litem*); *In re Mast*, 217 Ind. 28, 25 N.E.2d 1003 (1940) (notice to attorney). *Contra*, *Hunt v. Searcy*, 167 Mo. 158, 67 S.W. 206 (1902). For states that have statutory provisions utilizing substitute notice see LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 49-51. As to this possibility in North Carolina—*quaere*.

²⁸ 136 N.C. 415, 48 S.E. 789 (1904).

²⁹ *Id.* at 423-25, 48 S.E. at 792-93.

³⁰ With an enlarged writ other courts have held this type of statute constitutional. E.g., *In re Clark*, 86 Kan. 539, 121 Pac. 492 (1912); *Ex parte Brown*, 39 Wash. 160, 81 Pac. 552 (1905).

committed had no means of placing the question of his sanity before any judicial authority.³¹ Thus the court in *Wilson* was not bound by precedent.³²

The court in *Wilson* by refusing to alleviate strict due process restraints in the area of commitment has definitely placed North Carolina in the bare minority. Due process is not so inflexible as to prevent special procedure for special needs.³³ The Supreme Court of the United States has stated that "it would be unwise to construe due process to meaning the strict application of notice and hearing,"³⁴ but instead should be "adapted to the end to be attained."³⁵

What then is the "end to be attained"? The basic consideration should be to serve the medical welfare of the sick while still protecting their rights.³⁶ In failing to take judicial notice of North Carolina's

³¹ *Boyette* has been cited mainly for the proposition that although a person has been committed via defective procedural due process, and thus entitled to discharge, he may temporarily be detained while proper proceedings are initiated to recommit. *E.g.*, *Barry v. Hill*, 98 F.2d 222 (D.D.C. 1938). This procedure has been highly recommended. 1961 *Hearings* 334. It is interesting to note that this procedure was not followed in *Wilson* although there had been ample evidence for a finding that the petitioner was dangerous to herself or others. 257 N.C. at 595, 126 S.E.2d at 490.

³² See also *Petition of Doyle*, 16 R.I. 537, 18 Atl. 159 (1889) in which a statute was held unconstitutional that did not permit a hearing prior to commitment. After this decision the writ of habeas corpus was enlarged, as North Carolina has done, and the court ruled that this cured the defect of lack of notice and hearing prior to commitment. *In re Crosswell*, 28 R.I. 137, 66 Atl. 55 (1907). The Missouri court, holding in *State ex rel. Fuller v. Mullinax*, 364 Mo. 858, 269 S.W.2d 72 (1954) that commitment by certification of two physicians violated due process even though provisions for appeal and an enlarged writ were available seems to have been based on precedent. For severe criticisms of this case see 68 HARV. L. REV. 549 (1955) and 31 N.D.L. REV. 94 (1955).

³³ As previously noted the majority of courts that have passed on the question of due process requirements in the commitment field have relaxed the need for notice and hearing. Cases cited notes 24-25 *supra*. Some authority for flexible due process is found under the doctrine of *parens patriae*, in that the legislature, as *parens patriae* may, to some extent, make provisions for the care of those who are unable to care for themselves, as in cases of insane persons and neglected children. *E.g.*, *Hammon v. Hill*, 228 Fed. 999 (W.D. Pa. 1915). For a criticism of this doctrine see Whitmore, *supra* note 4, at 522 n.18.

³⁴ *Brock v. North Carolina*, 344 U.S. 427-28 (1953). See also *Moyer v. Peabody*, 212 U.S. 78, 84 (1909).

³⁵ *Hager v. Reclamation District*, 111 U.S. 701, 708 (1884).

³⁶ Thus the direction is towards liberalized commitment procedures. See generally GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT, COMMITMENT PROCEDURES (No. 4, 1948); Kadish, *A Case Study in the Significance of Procedural Due Process—Institutionalizing the Mentally Ill*, 9 WESTERN POLITICAL Q. 93 (1956); Slovenko & Super, *The Mentally Disabled, the Law, and the Report to the American Bar Foundation*, 47 VA. L. REV. 1366 (1961); Weihofen & Overholser, *Commitment of the Mentally Ill*, 24 TEXAS

constantly improving mental health facilities³⁷ and to couple this with the realistic appeal procedure provided for by an enlarged writ, the court completely ignored the patient's medical rights. The fact that notice and a hearing may evolve into a painful traumatic experience for a mentally ill individual is now fully appreciated.³⁸ Notice to a paranoid may cause him to flee, while notice to a depressive may cause suicide.³⁹ North Carolina, as a result of *Wilson* now requires notice to be given not once, but twice. No other state so holds.

Has the court, by requiring application of strict due process, really given a person more protection from being "railroaded"?⁴⁰ Many states employ the same procedure for indeterminate commitment that North Carolina utilizes for observational purposes.⁴¹ In this state the observation period is utilized to further insure that a sane person is not being deprived of his liberty. Only after the hospital authorities have had a chance to observe the individual's behavior and have certified to the clerk that he is mentally ill is a patient indeterminately committed. It is questionable that a second notice and hearing at the end of the observation period would serve any useful purpose. The only new evidence likely to be introduced is the psychiatrists' testimony concerning the patient's behavior while in the institution.⁴² This testimony will be exactly the same as is

L. REV. 307 (1946); Comment, *Analysis of Legal and Medical Considerations in Commitment of the Mentally Ill*, 56 YALE L.J. 1178 (1947).

³⁷ North Carolina is ranked twenty-fourth as to adequacy of physicians in public mental hospitals. 1961 *Hearings* 283. The state also has one of the highest percentages of first patient releases. Over eighty per cent of first admission patients are released within ninety days. *Id.* at 176. For a complete survey of the present status of North Carolina mental hospitals see STATISTICAL AND RESEARCH DIVISIONS OF N. C. HOSPITALS BOARDS OF CONTROL, TRENDS IN HOSPITALIZATION FOR MENTAL ILLNESS (1961).

³⁸ See, e.g., GUTTMACHER & WEIHOFEN, *PSYCHIATRY AND THE LAW* 295 (1952); GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, REPORT, COMMITMENT PROCEDURES, *op. cit. supra* note 36; Ross, *supra* note 2, at 966.

³⁹ 1961 *Hearings* 81.

⁴⁰ See generally Curran, *Hospitalization of the Mentally Ill*, 31 N.C.L. REV. 274, 293-97 (1953). Although the popular fears of "star chambers" and "lettres de cachet" are still prevalent, "railroading" as such, is almost nonexistent. Dr. Eugene Hargrove, Commissioner of Mental Health, has stated that in the seventeen years he has been associated with mental institutions he has not known of *one single case*. 1961 *Hearings* 176. This is also true in other jurisdictions. See, e.g., Slovenko & Super, *supra* note 36, at 1368. For a good example of a "railroading" case see *Shields v. Shields*, 26 F. Supp. 211 (W.D. Mo. 1939).

⁴¹ See LINDMAN & MCINTYRE, *op. cit. supra* note 2, at 44-106; Ross, *supra* note 2, at 1008-16. Other states have provisions for observational commitment before indeterminate commitment, but the observation period is initiated without notice and hearing.

⁴² For the proponents of a second hearing it should be noted that the

now forwarded to the clerk requesting indeterminate commitment. If a sane person is by some chance being "railroaded" there is little doubt that he would be released by the hospital or would have applied for a writ under the doctrine of *In re Harris*⁴³ by or before the time that the observation period is terminated.

The effect of this decision is twofold: (1) A more expensive court procedure is now required to commit, and (2) a definite hindrance has been introduced to the effective care and treatment of patients through the adverse effect of a second notice and possible second hearing.

The possibilities of what course of action the next General Assembly will take in light of this decision are innumerable. One possibility already under consideration is to do away altogether with the observation period and have one hearing to decide indeterminate commitment.⁴⁴ Thus the final result of a decision meant to protect the constitutional rights of the mentally ill may well cause them to lose one safeguard not afforded in any other state—an observation period after hearing before final commitment.

GEORGE C. COCHRAN

Real Property—Restrictive Covenants—Effect of Change of Conditions on Enforcement.

It is well established that under appropriate circumstances equity will invalidate privately imposed restrictive covenants limiting the use of land in unified subdivisions.¹ In general this is deemed appro-

second hearing will be conducted by the same clerk that made the original commitment. N.C. GEN. STAT. § 122-46.1 (Supp. 1961). The idea of a "last ditch stand" with a battery of lawyers cross-examining the hospital psychiatrists in order to secure the patient's release is inconceivable. If the clerk had enough evidence to commit for the observation period it is extremely doubtful that his decision will change, for the psychiatric testimony is in addition to the other positive evidence previously received and will serve to bear out what the clerk had already decided—that the person is mentally ill.

⁴³ 241 N.C. 179, 84 S.E.2d 808 (1954). It should be noted that there is dictum in the principle case indicating that the court did not fully consider the enlarged writ and its implications. 257 N.C. at 597, 126 S.E.2d at 492.

⁴⁴ Durham Morning Herald, Sept. 8, 1962. p. 1B, col. 6.

¹ This can result from two types of actions: affirmative relief granted to parties seeking to have the restrictions lifted, or refusal of the court to issue an injunction preventing violation of the restrictions. Either method being equitable relief, may or may not also preclude a remedy at law. Some courts hold the decree in equity extinguishes the covenant entirely, while others maintain that mere unenforceability in equity does not preclude an action at law for damages for breach of covenant. 2 AMERICAN LAW OF PROPERTY § 9.39, at 444-45 (Casner ed. 1952); 13 N.C.L. REV. 518 (1935).